State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Roger V. and Beverly Potwin

Revocation Petition
#3W0587-1-EB

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

This decision pertains to a petition to revoke Land Use Permit #3W0587-1 filed by Noyes Lane Realty Trust (Petitioner). The Petitioner alleges that Roger V. and Beverly Potwin (the Respondents) failed to provide it with adequate notice of their application for permit amendment and therefore requests that this amendment be declared void. Alternatively, the Petitioner asks that the permit amendment be revoked because the Respondents allegedly submitted inaccurate and materially incorrect information and that this, coupled with their failure to provide proper notice, constitutes willful or gross negligence. For the reasons explained below, the Environmental Board (Board) dismisses the revocation petition because the Petitioner lacks the requisite standing to bring such a petition to the Board.

## I. PROCEDURAL BACKGROUND

On April 15, 1996, David Olio and the Petitioner, by and through their attorney Michael Marks, Esq., of Tarrant, Marks & Gillies, filed a Petition for Revocation of Permit (Petition) with the Board seeking revocation of Land Use Permit #3W0587-1 (Permit Amendment No. 1) and supporting Findings of Fact, Conclusions of Law and Order. Permit Amendment No. 1 was issued to the Respondents and Green Mountain Bank by the District #3 Environmental Commission. It authorizes the Respondents to create a two-lot subdivision and, on the larger of the two lots, to reconfigure one house site and sewer and water easements previously approved in Land Use Permit #3W0587 as part of a planned residential development (Project). The Project is located on Red Barn Road in the Town of Hartford, Vermont, on property adjacent to the Quechee Development where the Petitioner owns property.

On June 11, 1996, an Act 250 Notice of Prehearing Conference was issued. This was published in the Valley News on June 14, 1996. A prehearing conference with respect to this matter was convened by Chair John T. Ewing on July 1, 1996, at 2:00 p.m., in Monpelier, Vermont, at the National Life Records Center Building, Room R2B. Persons entering timely appearances and participating in the prehearing conference were William H. Dwyer, designated representative for the Petitioner, and David Olio, both represented by attorney Marks. Also present were the Respondents, represented by William J. Donahue, Esq. At this prehearing conference, the Respondents challenged the standing of David Olio. It was agreed that the parties could address the standing question at oral argument as a preliminary matter on the day of the hearing.

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The Chair issued a Prehearing Conference Report and Order on July 15, 1996, The Order set forth the issues on appeal, contained certain party status rulings, and established certain deadlines in anticipation of a Hearing Officer hearing scheduled for August 20, 1996. The parties requested a continuance to facilitate negotiations. On August 12, 1996, the Chair issued a Continuance Order requiring the parties to file any agreement or a status report by August 30, 1996. On September 3, 1996, the Respondents filed a status report stating that no agreement had been reached. On September 13, 1996, Green Mountain Bank entered its appearance through counsel, Robert L. Newmark, Esq.

On September 27, 1996, A Notice of Second Preheating Conference was issued. A second preheating conference by telephone was convened by the Chair on October 10, 1996. In this second preheating, Green Mountain Bank was represented by Mr. Newmark. It was agreed by the parties and Mr. New-mark that Green Mountain Bank was not a proper party to the proceeding inasmuch as the Bank no longer holds an interest in the property which is the subject of the Permit Amendment.

On October 17, 1996, the Chair issued a Second Prehearing Conference Report and Order. This established a schedule for prefiling exhibits and an agenda for the hearing. A Notice of Public Hearing was also issued on that date.

On November 22, 1996, the parties filed a Stipulation of Facts. The stipulation contained findings of fact that the parties agreed were not in dispute and should therefore be made by the Hearing Officer and the Board. The parties also identified findings in dispute. Additionally, the parties stipulated to the admission of all prefiled exhibits.

On November 25, 1996, the Chair convened a third prehearing conference in this matter. Attorney Marks advised the Chair that David Olio was withdrawing as a party to this proceeding. This withdrawal was subsequently confirmed in a letter delivered on the day of the hearing.

On November 26, 1996, the Chair as Hearing Officer convened a hearing in this matter at the Hartford Town Offices. Those present and participating were the Petitioner, represented by Michael Marks, Esq., and the Respondents represented by William Donahue, Esq. Following an opportunity for introductory statements, the Hearing Officer recessed the hearing to conduct a site visit to inspect the respective properties of the Petitioner and the Respondents. Following the site visit, the Hearing Officer reconvened the hearing and placed his observations on the record. The parties did not object to the Hearing Officer's observations.

At the hearing, the Hearing Officer received into evidence all prefiled exhibits and admitted three additional exhibits, marked P-13, P-14, and P-5B. The Hearing Officer also granted the Respondents' uncontested Motion to Substitute, allowing into evidence Exhibit

POT- 4A (Hartford Planning Commission Final Approval for Application #94-14) in place of Exhibit POT-4. He further noted that Exhibits P-l, P-S and P-8 were duplicated in the Respondents' prefiled Exhibits POT-7, POT- 1, and POT-3 and that he would rely on Petitioner's numbered exhibits. Additionally, the Hearing Officer received without objection the cover sheet for the Upper Valley Lake Sunapee Regional Plan, Exhibit P-9. Finally, the Hearing Officer advised the parties that he would take official notice of the District #3 Environmental Commission's files with respect to #3 W0587, #3 W0587- 1 and #3W0587-2. Neither the Petitioner nor the Respondents objected to the Heating Officer taking such official notice.

The Hearing Officer heard testimony from the following witnesses: for the Petitioner, William N. Dwyer; for the Respondents, Surveyor Roy Hathorn, Respondent Roger Potwin and Hartford Town Lister Carl Johnson. The Petitioner had intended to call Barbara West, a local real estate agent, but she did not respond to Petitioner's subpoena to appear at the hearing. The Petitioner did not request that the hearing be continued in order to allow enforcement of the subpoena.

On December 10, 1996, the parties filed proposed findings of fact and conclusions of law. On December 17, 1996, the Petitioner filed a Reply Memorandum.

On April 11, 1997, the Hearing Officer issued his Proposed Findings of Fact, Conclusions of Law and Order in this matter. The parties were provided with an opportunity to file written objections and to present oral argument before the full Board in accordance with EBR 4 1 (D). Consistent with the Chair's Preliminary Order, issued April 21, 1997, the parties tiled briefs in response to the Hearing Officer's Proposed Decision. On May 7, 1997, the Respondents filed a brief in support of the Proposed Decision; on May 8, 1997, the Petitioner filed a brief in opposition. The Board heard oral argument with respect to the parties' positions on May 28, 1997, at 9:45 a.m., in Montpelier, Vermont, at the National Life Records Center Building, Room R2B.

The Board deliberated with respect to this matter on May 28, June 4, and July 9, 1997. On July 9, 1997, following a review of the record and Proposed Decision, and the briefs and oral argument of the parties, the Board declared the record complete and adjourned the hearing. This matter is now ready for final decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

## II. ISSUES

In its Petition, filed April 15, 1997, the Petitioner asked the Board to void or revoke Permit Amendment No. 1. The issues identified by the Petitioner and memorialized in the Prehearing Conference Report and Order, issued July 15, 1996, were stated as follows:

A. Did the Respondents provide adequate notice to Petitioner Noyes Lane Realty Trust of their application for Permit Amendment No. 1? If not, is the Permit Amendment void?

B. Alternatively, should Permit Amendment No. 1 be revoked? The Petitioner asserts that the Respondents submitted to the District #3 Commission inaccurate and materially incomplete information (an allegedly false certificate of service) and that this, coupled with the failure to provide proper notice, constitutes willful or gross negligence requiring revocation of the Permit Amendment pursuant to Rule 38(A)(2) of the Environmental Board Rules (EBR).

In that same Prehearing Conference Report and Order, the Chair preliminarily determined, based exclusively on the initial pleadings, that the Petitioner was a proper party to-' bring its Petition, pursuant to EBRs 38 and 14(A). However, after evaluating the evidence offered at the hearing on the merits as well as the applicable law, the Chair as Hearing Officer concluded that the Petitioner lacked the requisite standing to support a Petition for Revocation and recommended that the Petition be dismissed. Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Order at 15 (April 11, 1997). Therefore, the issue presently before the Board is whether to adopt the Hearing Officer's recommendation to dismiss the Petition for lack of standing or to reach a different decision based upon an independent review of the evidence and pleadings in this matter. See EBR 41.

## III. FINDINGS OF FACT

1. Roger V. Potwin and Beverly Potwin, the Respondents, are permit holders of Land Use Permit #3W0587-1 (Permit Amendment No.1). Permit Amendment No.1 authorizes the creation of a two-lot subdivision, one lot consisting of 8.1 acres and containing a farm house and barn (farm complex), and a second lot with 34.9 acres containing eight house sites. With respect to the second lot, Permit Amendment No. 1 also allows the reconfiguration of one house site and sewer and water easements, both previously approved in Land Use Permit #3 W0587 (1988 Permit) as part of a planned residential development (Project).

2. The 43 +/- acre tract of land (subject tract) covered by Permit Amendment No. 1 is identified in Book 209, Page 353, of the land records of the Town of Hartford, Vermont. It is located on Red Barn Road in the Town of Hartford.

3. Most of the subject tract is open, agricultural land, sloping downhill in a southeasterly direction. It is visible from several adjoining and nearby properties.

4. Prior to January 1989, the Respondents owned the farm complex, all of the subject tract, and additional acreage as part of their farming operations.

5. In the early 1980s, the Respondents subdivided a portion of their farm adjacent to the subject tract, creating the Quechee Lakes Subdivision (Quechee Development). On January 9,198 1, Respondents conveyed to William and Patricia Dwyer, husband and wife, a parcel of land (Dwyer lot) immediately adjoining, uphill and northwesterly of the subject tract, as part of this subdivision.

6. The deed from the Respondents to the Dwyers contained a restriction that prohibited construction of any building within seventy-five feet of the stone wall marking the southeasterly boundary of the Dwyers' parcel with the subject tract.

7. The Dwyers purchased the Dwyer Lot with the deed restriction based on their assumption that no house would be constructed on the subject tract so as to obstruct their view to the southeast.

8. In 198 1, the Dwyers constructed a single-family residence on the Dwyer Lot. Said house was sited so as to afford the Dwyers a southeasterly view of much of the subject tract as well as the Quechee River valley beyond.

9. The Dwyers moved into their house in about November 198 1, using it as a part-time residence while maintaining legal residency in the State of Massachusetts.

10. On November 6, 1984, William and Patricia Dwyer conveyed legal title of the Hartford property to 'HAROLD F. HINES, Trustee of Noyes Lane Realty Trust under Declaration of Trust dated October 25, 1984 and his successors and assigns." This conveyance was made by deed, recorded at Book 105, Page 412, in the land records of the Town of Hartford, Vermont. Mr. Hines was the Dwyers' accountant in Massachusetts, and his residence is identified in the deed as Tewksbury, County of Middlesex, Massachusetts. The Dwyers created this trust as an estate planning device, and the trust holds no other real estate. Patricia Dwyer is the sole beneficiary of the trust.

11. Sometime in 1988, the Respondents entered into a contract to sell to Wallace R. and Libby Pia Plapinger d/b/a Quechee Custom Home Development Co., Inc. (QCHD) the farm complex and subject tract.

12. QCHD and the Respondents jointly applied for necessary state and local approvals for the development of the subject tract. The Plapingers were responsible for preparing and submitting permit applications for themselves and the Respondents. The Respondents paid the Plapingers $10,000 as a portion of the costs incurred in making these permit applications.

13. After receiving approval from the Town of Hartford to develop the tract as a planned residential development, QCHD and the Respondents filed Land Use Permit Application #3 W0587 (1988 Permit Application) with the District #3 Environmental Commission on October 26, 1988.

14. A hearing was held with respect to the Permit Application on November 30, 1988. No adjoining property owners entered appearances and requested party status in the Permit Application proceeding.

15. On December 7, 1988, the District Commission issued to the Respondents and QCHD Land Use Permit #3W0587 (1988 Permit) and supporting Findings of Fact, Conclusions of Law and Order. The 1988 Permit authorized the development of the subject tract as a planned residential development with eight clustered house sites on common land. The approved site plan identified building sites for each house, but did not specify a specific building footprint within the designated building area. House Site No. 6 was located immediately downhill and to the south of the Dwyer Lot on the approved site plan.

16. The Dwyers knew that QCHD and the Respondents had applied for an Act 250 permit for the planned residential development. Notice of the 1988 Permit Application was received by the Noyes Lane Realty Trust care of Mr. Hines in Massachusetts. However, neither the Trust nor the Dwyers chose to enter an appearance, request party status, or otherwise participate in the hearing on the 1988 Permit Application.

17. The Dwyers did not participate in the hearing on the 1988 Permit Application because of their mistaken belief concerning the location of proposed House Site No. 6. William Dwyer believed that this house site would be located downhill but to the west of the Dwyers' house, thereby preserving the view from the Dwyers' house. Mr. Dwyer formed this belief based on a discussion he allegedly had with Barbara West, a local real estate agent, concerning the layout of the proposed development of the tract. Ms. West was the

Respondents and Plapingers' Project Consultant in the Permit Application proceeding before the District #3 Environmental Commission.

18. At no time prior to or during the Commission's proceeding'on the 1988 Permit Application did the Dwyers inspect the the Commission files related to that application in order to ascertain the proposed locations of building sites in the Project.

19. Condition 25 of the 1988 Permit required that all construction on the Project be completed by October 1, 1993.

20. Condition 26 stated:

> This permit shall expire on December 5, 2008, unless extended by the District Commission. Notwithstanding the latter date, this Permit shall expire one year from the date of issuance if the permittees have not demonstrated an intention to proceed with the project. In any event, substantial construction must occur within two years of the issuance date.

21. The 1988 Permit further provided:

> The failure to comply with any of the above conditions may be grounds for permit revocation pursuant to 10 V.S.A. Section 6090(b).

22. On January 19, 1989, the Respondents conveyed their farm complex and the subject tract to QCHD. The deed is filed in Book 149 at Pages 454-458 of the land records of the Town of Hartford.

23. At the closing on January 19, 1989, QCHD executed and delivered to the Respondents a mortage deed covering 34.9 acres of the 43-acre tract, while excepting from the lien of the mortage the house, barn, and 8.1 acres of land.

24. QCHD defaulted on the note it gave to the Respondents which was secured by the aforesaid mortgage. On June 10, 1992, the Respondents and QCHD entered into an agreement whereby the Respondents, in lieu of foreclosure, took back a deed to the 34.9 acres covered by the lien of the mortgage.

25. On June 16, 1992, the Respondents filed in the Town of Hartford Land Records the deed to the 34.9 acres from QCHD given in lieu of foreclosure.

26. Sometime in 1992 the Dwyers moved from Massachusetts to Vermont. In May 1993, a month after the lodging of the 1993 Town of Hartford Grand List, the Dwyers notified the Hartford Town Clerk of their move from Massachusetts to Quechee, Vermont. At about this time the Dwyers also opened a post office box at Quechee, Vermont.

27. On September 27, 1993, James Mullen, the Town of Hartford Zoning Administrator, sent a letter to QCHD and a copy to the Respondents informing them that the aforesaid deed in lieu of foreclosure constituted an illegal subdivision. The letter informed them that they must apply for an amendment to the planned residential development approved by the Town of Hartford. It was at this time that the Respondents realized that they must also apply for an amendment to their Act 250 Permit.

28. The Respondents retained Roy Hathorn, a registered land surveyor, to prepare and submit applications for necessary amendment approvals.

29. Roy Hathom completed a survey of the property on October 22, 1993. This survey depicted the locations of the house sites as they were previously approved in the 1988 Permit, with the one exception that House Site No. 1 was moved slightly in order to locate it to the northwest of the new property line created by the subdivision. The survey also depicted the reconfiguration of certain wastewater and sewer easements.

30. On March 28, 1994, the Town of Hartford Planning Commission gave final approval for an amendment to the planned residential development, approving the relocation of House Site No. 1 and the reconfigured easements. In addition, the Town of Hartford Zoning Administrator subsequently approved the two-lot subdivision.

31. On June 28, 1994, Roy Hathom submitted to the District #3 Environmental Commission an application to amend the 1988 Permit, Land Use Permit Application #3 W0587-1 (Amendment Application No.1), so as to conform with the two-lot subdivision and the amendments to the planned residential development approved by the Town of Hartford.

32. Amendment Application No. 1 requested only that House Site No. 1 be relocated from the site indicated in the 1988 Permit. Amendment Application No. 1 did not request that any other house site be relocated, including House Site No. 6.

33. Mr. Hathom filed with Amendment Application No. 1 a list of abutting landowners. The list he filed on June 28, 1994, included the following:

Hines Harold F Trustee
c/o Dwyer Trustee

12 Hidden Valley Rd.
Westford, MA 01886

34. The above address for the Dwyer Lot appears in the 1993 Town of Hartford Grand List.

35. At some time prior to May 1994, the Dwyers acquired the following post office address: P.O. Box 971, Quechee, Vermont.

36. A May 20, 1994, printout of the 1994 Town of Hartford Grand List identifies the owner of the Dwyer Lot as:

Hines Harold F Trustee
c/o Dwyer
P.O. Box 971
Quechee, Vermont 05059

37. Mr. Hathom acquired Trustee Hines's address from the Town of Hartford Listers' Office sometime after March 2 1, 1994 but before the filing of Amendment Application No. 1. In obtaining this information, he followed his customary practice: first, he identified each abutting parcel from the Town tax maps and, second, he either asked a Lister to run a computer search to find the listing for each abutting tax map identification number or, if the computer was not available, he asked to see the current listing for each abutting tax map identification number.

38. The District #3 Coordinator deemed the Amendment Application No. 1 complete on July 20, 1994 and treated it as a minor amendment application pursuant to EBR 34(C). A copy of the proposed permit, along with A Notice of Application and Public Hearing explaining the process for requesting a hearing, was sent on July 26, 1994, to statutory parties and those adjoining property owners identified by Mr. Hathom. On the service list of July 26, 1994, was listed Harold F. Hines at the address listed above in Finding 33.

39. The Dwyers did not know about the filing of Amendment Application No. 1 and the proposed permit. They did not receive personal notice of the application. The Dwyers do not know whether Mr. Hines received notice of the application and proposed permit.

40. On August 1, 1994, a Notice of Application and Public Hearing for Amendment Application No. 1 was published in the Valley News, a newspaper of record in the locality of the Project.

41. The deadline for requests for hearings was August 12, 1994. No adjoining property owners requested a hearing with respect to Amendment Application No. 1.

42. Land Use Permit #3 W0587-1 (Permit Amendment No. 1) was issued on September 14, 1994.

43. Condition 7 of Permit Amendment No. 1 provided that: "All conditions of Land Use Permit #3 W0587 shall remain in effect except as amended herein."

44. Condition 8 of Permit Amendment No. 1 stated:

> Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the permittee(s) has @have] not commenced construction and made substantial progress toward completion within the three year period in accordance with 10 V.S.A., Section 6091(b) (Amended June 21, 1994).

4.5. Condition 9 of Permit Amendment No. 1 stated:

> Pursuant to 10 V.S.A. § 6090(b) (effective June 21, 1994), this permit is hereby issued for an indefinite term, as long as there is compliance with the conditions herein.

46. Sometime in mid-1995, the Respondents installed a septic system on the 34.9-acre tract to service House Site No. 6. They also established a road into the northwest comer of the tract. Since then, they have undertaken no other construction in furtherance of completion of the Project.

47. In the summer or early fall 1995, the Respondents gave an option to purchase the subject tract to David Leatherwood. Mr. Leatherwood arranged for the placement of stakes on the subject tract to demark the areas reserved for approved house sites. One of Mr. Hathom's employees staked out the comers of House Site No. 6 with 1"x 1" stakes. They placed four stakes immediately downhill of the Dwyer Lot and house. One of the stakes was located approximately 63 feet from the property line of the Dwyer Lot.

48. In January 1996, the Respondents, through their attorney, Thomas P. Wright, Esq., applied for Land Use Petit Amendment #3 W0587-2 (Amendment Application No. 2) to extend the deadline for commencement of construction of the Project. This was treated as a minor amendment application by the District #3 Environmental Commission. Land Use Permit #3 W0587-2 (Permit Amendment No. 2) was issued on February 13, 1996.

49. Condition 2 of Permit Amendment No. 2 extended the construction completion deadline to October 1, 1998. Condition 3 extended the life of the Permit "for an indefinite term, as long as there is substantial compliance with each condition."

50. The service list for Amendment Application No. 2 did not list the Dwyers or Harold F. Hines. Neither the Dwyers nor Mr. Hines received personal notice of Amendment Application No. 2 and the proposed decision.

51. Sometime in 1996 Harold F. Hines resigned as Trustee of Noyes Lane Realty Trust. The Dwyers designated Patricia Comeau as Trustee. However, no deed has been executed conveying the legal title to the Dwyer Lot to Ms. Comeau.

52. A June 10, 1996, printout of the 1996 Town of Hartford Grand List identifies the owner of the Dwyer Lot as:

> Hines Harold F Trustee
> c/o Patricia Comeau
> PO Box 1343
> Quechee VT 05059

53. In 1996, the Dwyers placed a set of four stakes downhill and to the west of the stakes for House Site No. 6 referred to in Finding 44. The Dwyers did this to demark the location of the house site as they understood it, based on William Dwyer's 1988 discussion with Barbara West. See Finding 17. The Dwyers' stakes are located outside the viewshed from their house in an area to the south and west of the house. The stakes are located in a stand of trees, nestled against the hillside below the so-called Ryan and Sager lots in the Quechee Development.

54. The Upper Valley Lake Sunapee Regional Planning Commission adopted a new Regional Plan in 1992, establishing new recommendations for development design intended to protect important scenic resources. The Town of Hartford is a member town of this Commission.

55. The Town of Hartford adopted a new Master Plan on July 27, 1993, recommending the application of certain design standards for development in the town's scenic areas.

## IV. CONCLUSIONS OF LAW

### A. FINALITY OF DECISIONS

It is axiomatic that a permit decision becomes final if not appealed, whether or not that permit was properly granted in the first instance. In re Taft Corners Assocs., 160 Vt. 583,593 (1993). Once a permit is issued and the applicable appeal period has expired, the findings, conclusions, and permit are final and are not subject to attack in a subsequent application proceeding, whether or not they were properly granted in the first instance. Re: Nehemiah Associates., #1R0672-1-EB (Remand), Findings of Fact, Conclusions of Law, and Order at 2 1 (April 11, 1997). "To hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process." Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139 (1989).

The facts are clear. The Petitioner received notice of the 1988 Permit Application. The Petitioner elected not to participate in the permit proceeding, even though the Dwyers were aware of the pending application. The District Commission issued the 1988 Permit, establish the house sites for the Respondents' planned residential development, including House Site No. 6. No party appealed the Permit decision. Therefore, the findings, conclusions and Permit issued by the District Commission became final.

The consequence of such finality is that the Petitioner may not attack the 1988 Permit through a proceeding involving Amendment No. 1. Amendment Application No. 1 did not propose to change the location of House Site No. 6. Indeed, Amendment Application No. 1 was treated as a minor amendment application, because in the judgment of the District Coordinator the proposed amendment involved a material but not substantial change to the permitted project. See EBR 34(C) (eff. September 1, 1991). Therefore, the District Commission's review of Amendment Application No. 1 was restricted to consideration of the potential impacts to Act 250 values posed only by the two-lot subdivision, the minor re-siting of House Site No. 1, and the reconfiguration of certain easements. Accordingly, even if for argument's sake, notice of Amendment Application No. 1 was defective, the Petitioner cannot now use the vehicle of a revocation petition to obtain a remand to the District Commission for the purpose of re-litigating an issue that became settled in 1988.

In its Petition for Revocation of Permit and subsequent arguments, the Petitioner has asserted that the 1988 Permit "had expired" or was "stale" by 1994 inasmuch as six years had elapsed since the issuance of the permit and the Respondents had not complied with the Permit's terms requiring substantial construction within two years of issuance and completion by Octob-1, 1993. The Petitioner argues that had it received notice of Amendment Application No. 1 it would have objected to the "revival" of the 1988 Permit and asked the Commission to review the

Project anew under all relevant Act 250 criteria. It argues that substantive review of the Project would have resulted in its rejection and perhaps a substantial redesign of the Respondents' planned residential development, including the re-location of House Site No. 6. In its Brief on Proposal for Decision, the Petitioner relies on EBR 35(C)(2), a provision since repealed, and the Board's previous decision, Re: Homestead Design, Inc., Land Use Permit #4C0468-1-EB, Findings of Fact, Conclusions of Law and Order (Sept. 6, 1990), for the proposition that the District Commission "had both the authority and the responsibility to reconsider all Act 250 criteria fresh" in response to the Amendment Application No. 1.

However, the Petitioner misconstrues the relevant law. Homestead Design stands for the proposition that a District Commission *may require an* applicant to file, in the context of a request for extension of a construction completion deadline, an amendment application addressing changes in the circumstances surrounding a project. Homestead Design at 4. This decision, however, does not stand for the proposition that a Commission must review de novo the entirety of a previously approved project under all Act 250 criteria when considering a minor amendment application for that project.

More to the point, the 1988 Permit had not expired at the time of the filing of Amendment Application No. 1. Indeed, the Permit established an express expiration date of December 5, 2008, which has since been extended by statute for an indefinite term as long as there is compliance with the conditions of the permit. See 10 V.S.A. §6090(b)(2); see also, Permit Amendment No. 1, Permit Condition 9.

Compliance with permit conditions is presumed until facts are found to the contrary. Therefore, in order for the 1988 Permit to have "expired" for noncompliance with the terms of Conditions 25 and 26, the Board would have had to have made findings, prior to the issuance of Amendment No. 1, that such noncompliance had occurred. This is because the so-called "expiration" provisions related to the intent to proceed with development and construction were not self-executing. In other words, due process required that noncompliance had to be proven. The procedural means for proving that the Permittees had failed to comply with any of the conditions contained in the 1988 Permit was a revocation proceeding pursuant to EBR 38(A) or possibly an abandonment proceeding pursuant to EBR 38(B). See EBRs (eff. Sept. 1, 1991). Since no one had challenged the 1988 Permit by June 1994, the 1998 Permit had not "expired" or become "stale" by the time of the filing of Amendment Application No. 1. Consequently, once Permit Amendment No. 1 was issued and became final, Condition 8 of that permit extended the construction completion deadline to September 14, 1997, pursuant to 10 V.S.A. $6091(b).

Therefore, it is the Board's opinion that the 1988 Permit, as amended, has not expired. Further, because the Petitioner elected not to participate in the 1988 Permit proceeding, it has no *standing* to bring a petition to declare that permit void for non-use pursuant to EBR 38(B)(1).

Likewise, as explained below, the Petitioner has no standing to bring a revocation proceeding with respect to Permit Amendment No. 1. However, even if the Board were to rule differently with respect to the standing question, the Board concludes that finality dictates that the 1988 Permit stands, and that the Petitioner cannot now force the Respondents to redesign their planned residential development by attempting to convert a revocation proceeding with respect to a minor amendment into a hearing to relitigate the merits of the Project.

B. RULE 38 PETITION

This proceeding was initiated by the Petitioner with the filing of a Petition for Revocation of Permit. The Board has jurisdiction to consider revocation petitions pursuant to EBR 38. The grounds for revocation are set forth in EBR 38(A)(2). The Board may revoke a permit if it finds:

> (a) The applicant or representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or (b) the applicant or successor in interest has violated the terms of the permit or any rules of the board; or (c) the applicant or successor in interest has failed to file an affidavit of compliance with respect to specific conditions.

The Petitioner in a proceeding to revoke a land use permit has the burden of proof. See Putney Paper Co., Inc., #2W0436-6-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Feb. 2, 1995). The Board is reluctant to revoke a permit when doubtful or uncertain about the grounds for revocation. Stokes Communications Corp., #3R0703-EB (Amendment Application Revocation) Memorandum of Decision at 9 (March 20, 1996).

The Petitioner asserts that the Respondents failed to provide adequate notice of Amendment Application No. 1 in conformance with the requirements of Board rules and procedures. The Petitioner also asserts that the Respondents submitted to the District #3 Commission inaccurate and materially incomplete information (an allegedly false certificate of service) and that this, coupled with the failure to provide proper notice, constitutes willful or gross negligence. Although the Petitioner asks the Board to declare Respondents' permit void or to revoke it, the asserted bases for seeking termination of the permit are squarely within the ambit of EBR 38(A)(2)(a) and (b).

At the time the Respondents' filed their application for Permit Amendment No. 1, the general rule was that applicants were required by Board rule and procedure to file a list of

adjoining property owners with the District Commission.[1] In June 1994, the Petitioner held title to the Dwyer Lot. Moreover, the record shows that the Respondents' agent, Mr. Hathorn, included Trustee Harold Hines on the list of adjoining property owners filed with Amendment Application No. 1.

Nevertheless, the address for Trustee Hines supplied to the District Commission was out-of-date as of the time of the filing of Application Amendment No. 1. Mr. Hathom had relied on the Town of Hartford's 1993 Grand List in preparing the list of adjoining property owners, and he therefore provided the District Commission with a Massachusetts address for Trustee Hines. Indeed, the deed to the Dwyer lot identified Trustee Hines as a resident of Massachusetts. However, the record further reveals that as early as May 20, 1994, the address for Mr. Hines had been changed in the Town of Hartford Grand List to Quechee, Vermont. Even though this

[1] At the time of filing the application for Permit Amendment No. 1, EBR 10(F) provided:

> The applicant shall file with the application a list of adjoining property owners to the tract or tracts of land proposed to be developed or subdivided, unless this requirement is waived by the district coordinator. Provision of personal notice to adjoining property owners and other persons not listed in section (E) of this Rules shall be solely within the discretion and responsibility of the district commission.

There is no evidence in the record to suggest that the District Commission consented to a waiver of the personal notice requirements of this rule. However, the Board notes that the District Coordinator had the discretion under then EBR 35(C)(1) to determine that the changes proposed in Amendment Application No. 1 did not involve significant impacts and that therefore the application should be noticed as a minor application, subject to the simplified review procedures set forth then in EBR 34(C)(l)-(5). See EBRs (eff. Sept. 1, 1991). Indeed, this is precisely what the Coordinator did.

The review procedure under then EBR 34(C)(2) provided that applications processed as minor amendment applications were exempt from the distribution, posting and publication requirements of 10 V.S.A. § 6084 and sections (E)-(G) of EBR 10, and should be processed in the same manner as minor applications under EBR 5 1 (B). EBRs (eff. Sept. 1, 1991). Title 10 V.S.A. § 6084 did not require personal notice to adjoining property owners. Moreover, the personal notice requirements of EBR 1 O(F) was made inapplicable through the exemption in EBR 34(C)(2). Therefore, in the Board's opinion, neither the Respondents nor the District Commission was under a duty to provide personal notice to the Petitioner.

information was a matter of public record readily available to Mr. Hathorn, Mr. Hathorn failed to update the adjoiners list prior to filing Amendment Application No. 1 on June 28, 1994. As a consequence, notice of the application and proposed permit amendment was sent by the District Coordinator to Mr. Hines at an address that was not current. For this mason, the Board cannot presume that notice of Amendment Application No. 1 was received by the Petitioner. See Estey v. Leveille, 119 Vt. 438, 438-39 (1957).

The Board takes seriously deficiencies in personal notice where personal notice is required. The Board has routinely issued remand orders to assure compliance with the requirements of EBR 10(F). Re: Richard and Sandra Conway, Land Use Permit #1R0632-EB, Findings of Fact, Conclusions of Law and Order (Sept. 1, 1988), affirmed, In re Conway, 152 Vt. 526 ( 1989); Re: Charles and Barbara Bickford, Land Use Permit #5 W 1093-EB (Revocation), Memorandum of Decision (April 12, 1993); Re Lawrence White, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB (Revocation) and #1R0391-7-EB (Interlocutory), Findings of Fact, Conclusions of Law, and Order at 10- 11 (Sept. 17, 1996). However, the Board can only exercise its revocation and remand authority when its jurisdiction has been properly invoked.

Not everyone has standing to bring a revocation petition. A person must first satisfy the requirements of EBR 38(A). Re Lawrence White at 10-l 1. EBR 38(A) provides, in relevant part:

> A petition for revocation of a permit under 10 V.S.A. § 6090(c) may be made to the board by any person who was a party to the application, by any adjoining property owner whose property interests are directly affected by an alleged violation, by a municipal or regional planning commission, or any municipal or state agency having an interest which is affected by the development or subdivision.

(Emphasis added).

Therefore, a person may prosecute a revocation petition before the Board if he or she was a party to the application at issue or an adjoining property owner whose property interests are directly affected by an alleged violation.

The Petitioner in the present proceeding was neither a party to the 1988 Permit proceeding nor to the minor amendment proceeding which resulted in the issuance of Permit Amendment No. 1. Therefore, in order to have standing to bring a revocation petition, the Petitioner must demonstrate that it is an adjoining property owner whose property interests are directly affected by the violations which it has alleged.

The essential facts are as follows. The Petitioner holds title to the Dwyer Lot and it did so at the time the Respondents tiled the 1998 Permit Application and Amendment Application No. 1. The location of House Site No. 6 was'approved as part of the 1988 Permit. House Site No. 6 is located within the viewshed visible from the Dwyers' house.

The Petitioner argues in its Brief on Proposal for Decision that it should be entitled to bring this revocation proceeding because it should have been named as a co-applicant in the various permit applications for this Project. It asserts that it has the requisite interest to support co-applicancy because the Dwyer Lot contains a deed restriction prohibiting the construction of any building within severty-five feet of the stone wall marking the south-easterly boundary of this parcel with the subject tract. The Petitioner cites for its authority EBR 10(A) which in 1988 and at present states in relevant part:

> The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any person is of such significance that the application cannot be accepted without their participation as co-applicants.

The Board has previously concluded that whether a person should be required to be a co-applicant is a discretionary determination of a commission and the Board. Furthermore, an unappealed commission decision not making an adjoining landowner a co-applicant, when that landowner held a right-of-way over the project tract, was a final determination even if the commission erred by not making that adjoiner a co-applicant. Re: David Enman (St. George Property), Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 18- 19 (Dec. 23, 1996).

There is no dispute that the Petitioner in this case had notice of the 1988 Permit Application. The proper time for it to have raised the co-applicancy issue was in the proceeding on that application when the Commission was considering the design of the planned residential development and the location of the House Site No. 6. Having decided not to enter its appearance and participate in that proceeding, the Petitioner has waived the co-applicancy issue since the 1988 Permit decision was not appealed and therefore became final. As a consequence, it is immaterial whether the Petitioner should have been a co-applicant; the fact is, it was not. Therefore, the Board cannot and will not consider the Petitioner's co-applicancy argument as

support for its claim of standing in this revocation proceeding.*

The Board concedes that is possible that if the Respondents or their successors in interest were to build a house within the area designated House Site No. 6, that that structure could obstruct at least a portion of the Dwyers' view. However, the location of House Site No. 6 was not at issue in Amendment No. 1. Therefore, even if the Respondents' agent had provided accurate address information for Trustee Hines and the District Coordinator had provided the Petitioner with personal notice of the Amendment Application No. 1, it is highly doubtful that the Petitioner would have provided evidence that would have changed the outcome of the amendment proceeding. This is because the aesthetic and other impacts the Petitioner wishes to have addressed are related to the 1988 Permit and not to the proposed changes that were under consideration by the District Commission in 1994.

The Petitioner also has made vague assertions that the subject tract is located in an area of significant scenic value and that by clustering the houses as provided in Respondents' planned residential development, Criteria 8 and 10 are violated. The Petitioner argues that the recently adopted recommendations and design standards contained in the 1992 Regional Plan and the 1993 Town Master Plan should be applied to this Project. However, the design of the Respondents' planned residential development was approved by the District Commission in 1988, as was the specific location of House Site No. 6. None of the minor changes proposed by the Respondents in Amendment Application No. 1 called for the relocation of approved house lots, with the exception of House Site No. 1. Moreover, the Petitioner has not asserted that the change in location of House Site No. 1, nor any of the other changes described in Amendment Application No. 1, present environmental impacts which directly affect its property interests under any of the Act 250 criteria.

The Board has not hesitated to find standing where a petitioner for revocation can demonstrate that its property interests are directly affected by an alleged violation. For example, the Board has concluded that an adjoining property owner, who was not a party to an original application and who had not received notice of subsequent amendment applications, had standing to prosecute a revocation petition because he had demonstrated that the potential and indeed actual

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2 The Board also notes that not all interests in a subject tract rise to the level of constituting "a substantial property interest" thereby warranting the inclusion of the holder of such interest as a co-applicant. For an analysis of co-applicancy under EBR 10(A), see Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon, Application #1R0426-1-EB, Findings of Fact, Conclusions of Law, and Order (Feb. 29, 1996).

effects of the permitted project activities on his property were directly relevant to evaluating the permitted project under certain specified Act 250 criteria. Re Lawrence White, supra at 1 I.

Such a demonstration has not been made by the Petitioner in this case. The Chair as Hearing Officer preliminarily determined, based on the initial pleadings, that the Petitioner had standing to bring its petition. Prehearing Conference Report and Order at 4 (July 15, 1996). However, the evidence adduced at hearing and a review of the law convinces the Board that the Petitioner has failed to demonstrate how its property interests are directly affected by the alleged violations resulting from the Respondents' failure to provide accurate address information for Petitioner's Trustee.

C. CONCLUSION

For the foregoing reasons, the Board determines that dismissal of this Petition for Revocation of Permit is warranted. Therefore, the Board does not reach the arguments raised by the Petitioner in support of revocation.

V. ORDER

This matter is hereby dismissed.

Dated at Montpelier, Vermont, this 15th day of July, 1997.

VERMONT ENVIRONMENTAL BOARD

John T. Ewing, Chair
Marcy Harding
Sam Lloyd
William Martinez
Rebecca M. Nawrath
Robert Opel
Robert Page, M.D.
Steve E. Wright

Arthur Gibb. abstained.